Supreme Court, U.S.
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No. 94-1009

In The

Supreme Court of the United States

October Term, 1994

WILLIAM and DEBRA LARSSON,

Petitioners,

v.

CITY OF LAKE OSWEGO, OREGON,

Respondent.

On Petition For Writ Of Certiorari
To The Oregon Supreme Court

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

The question as stated by Petitioners assumes the answer the Petitioners seek. The actual question presented by the Petition should be restated as follows:

Does a municipality violate the rights of an applicant for a land use permit under the First Amendment to the United States Constitution or the Voting Rights Act by imposing a condition upon a land use permit under the following circumstances:

1. The municipality makes an uncontested determination pursuant to a public hearing process that the condition is required in order to comply with a criterion for approval of the land use permit;

2. The condition requires the applicant to execute a written waiver of his or her ability under the local improvement ordinance to participate in a procedure that can delay formation of a local road improvement district for six months (a "non-remonstrance agreement"); and

3. The local improvement ordinance requires two public hearings, the first prior to formation of the local improvement district and the second prior to levying a special assessment to pay for the local improvement, at which anyone, including persons who have signed non-remonstrance agreements, may appear before the governing body and testify in favor or in opposition to formation of the local improvement district?

LIST OF PARTIES

The caption contains the names of all parties to this proceeding.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS 1

I. STATEMENT OF THE CASE 2

The Facts 2

II. ARGUMENT (REASONS FOR DENYING THE WRIT) 4

A. The Permit Condition Imposed By The City Does Not Affect Speech 5

B. Because The Permit Condition Does Not Affect First Amendment Rights, It Also Does Not Implicate The "Doctrine of Unconstitutional Conditions" 12

C. This Case Does Not Warrant Review By The United States Supreme Court 13

III. CONCLUSION 15

IV. APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OREGON SUPREME COURT ..... App. 1

1. Lake Oswego Charter, Chapter IX. Public Improvement, Section 37, Improvements ..... App. 1

TABLE OF CONTENTS – Continued

Page

2. Lake Oswego Code, Chapter 40, Improvement Procedure, Sections 40.010 to 40.160 (Note: Provisions of the Lake Oswego Code were reformatted and renumbered from a five digit to a seven digit format on March 31, 1994. This update did not substantively change the provisions. The Appendix and the brief reference the five digit format for consistency and clarity.).....App. 2

3. Oregon Revised Statutes (ORS) 223.387 to 223.401.....App. 21

TABLE OF AUTHORITIES

Page

Cases

Blackwell v. City of St. Charles, 726 F. Supp. 256 (E.D. Mo. 1989), *aff'd based on the district court's reasoning*, 917 F.2d 1150 (8th Cir. 1990) 14

City of Woodburn v. Dekabi, 20 Or. App. 426, 531 P.2d 913 (1975) 6

Dolan v. City of Tigard, 114 S. Ct. 2308 (1994) 5, 12, 13

Five Mile Prairie v. City of Spokane, 51 Wash. App. 816, 755 P.2d 836 (1988) 14

Larsson v. City of Lake Oswego, 26 Or. LUBA 515 (1994) 4, 5, 10

Larsson v. City of Lake Oswego, 127 Or. App. 647, 874 P.2d 99 (1994) 2

Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) 12

Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima, 122 Wash. 2d 371, 858 P.2d 245 (1993) 14

Constitutional Provisions

U.S. Const. amend. I. 4, 5, 9, 12, 14

U.S. Const. amend V 5, 12

U.S. Const. amend. XIV 9

Or. Const. art. I, § 8 9

Or. Const. art. I, § 26 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C.A. § 1973i(a) (1994) 11
42 U.S.C.A. § 1983 (1994) 11
ORS 223.387 to 223.401 ..... 2, 6
ORS 223.389 6
ORS 223.389(2) 6

ORDINANCES AND MISCELLANEOUS

Lake Oswego Charter, Chapter IX, Section 37 ... 1, 6, 9
LOC Chapter 40 ..... 1, 4, 9
LOC 40.010 to 40.160 ..... 1, 6
LOC 40.040 ..... 7, 8, 9
LOC 40.040(1)(e),(f) 7
LOC 40.040(2) 7
LOC 40.040(2)(a),(e) 7
LOC 40.050(1) 9, 11
LOC 40.050(1)(a) 7
LOC 40.050(1)(b) 7
LOC 40.050(2) 7, 9, 11
LOC 40.060 ..... 7, 9
LOC 40.060(2) 7, 10, 11
LOC 40.080(2) 10
LOC 40.090 ..... 7, 9, 10, 11

TABLE OF AUTHORITIES – Continued

Page

LOC Chapter 49 2

LOC 49.125 3

LOC 49.140(1)(H) 2

LOC 49.200 to 49.225 2

LOC 49.225 3

LOC 49.620 2

LOC 49.620(1)(A),(B) and (C) 3

Webster's Seventh New Collegiate Dictionary 725 (1971) 6

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BRIEF IN OPPOSITION TO PETITION

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Petition and Appendix omit several ordinances and regulations involved in this case in violation of Rule 14.1(f) of this Court. The City has incorporated such Ordinances and Regulations in its Appendix.

1. Lake Oswego Charter, Chapter IX. Public Improvement, Section 37, Improvements.

2. Lake Oswego Code, Chapter 40, Improvement Procedure, Sections 40.010 to 40.160.

   Note: Provisions of the Lake Oswego Code were reformatted and renumbered from a five digit to a seven digit format on March

31, 1994. This update did not substantively change the provisions. The Appendix and the brief reference the five digit format for consistency and clarity.

3. Oregon Revised Statutes (ORS) 223.387 to 223.401

I.

STATEMENT OF THE CASE

Respondent City of Lake Oswego ("City") respectfully requests this Court to deny the Petition for a Writ of Certiorari to the Oregon Supreme Court to review the opinion in *Larsson v. City of Lake Oswego*, 127 Or. App. 647, 874 P.2d 99 (1994).

A. The Facts:

In 1989, Petitioners applied to partition their 86,058 square foot property, located at the intersection of Iron Mountain Boulevard and Chandler Road in the City of Lake Oswego, into two parcels 20,078 and 65,980 square feet in size. App. 43a - 44a. The original minor partition (City file number SD 56-89) was approved by City staff on April 16, 1990, as a "minor development" pursuant to Lake Oswego Code (LOC) 49.140(1)(H). *Id.* Minor developments are staff decisions, subject to notice and the opportunity to appeal. LOC 49.200 to 49.225. *Id.*

Staff imposed a number of conditions of approval on the partition pursuant to LOC 49.620, which allows the City to impose conditions or restrictions on any major or minor development approvals in order to protect the public, implement the requirements of the Comprehensive Plan and Chapter 49, and/or to fulfill a need for

public services created or increased by the proposal. *Id.* LOC 49.620(1)(A),(B) and (C). These conditions included condition 3, which required the applicants to sign a non-remonstrance agreement and petition for formation of a local improvement district (LID) for future street improvements along Iron Mountain Boulevard and Chandler Road. *Id.*

The Petitioners did not appeal SD 89-56, and subsequently executed the non-remonstrance agreement. *Id.* The partition was completed, the new parcel (parcel 2) was sold, and a new dwelling was constructed on the new parcel during the summer of 1990. *Id.* The Petitioners retained parcel 1, which is occupied by their preexisting residence. *Id.*

In 1993, the Petitioners filed an application to modify the approved partition by deleting conditions 3 and 11 as applied to Parcel 1. *Id.* The application was filed pursuant to LOC 49.125, which requires such modifications to be processed as minor developments. *Id.* Staff denied the request on January 15, 1993. The applicants appealed the decision to the City's Development Review Board (DRB) pursuant to LOC 49.225, which held a de novo hearing and denied the modification on April 19, 1993. *Id.* Applicants then appealed the DRB's decision to the City Council. *Id.*

On October 7, 1993, the Council adopted its Findings and Order deleting condition 11, but retaining condition 3. App. 40a. The Petitioners appealed the Council's decision to retain condition 3 to the State of Oregon Land Use Board of Appeals (LUBA). On February 8, 1994, LUBA issued its opinion affirming the City Council's decision.

Larsson v. City of Lake Oswego, 26 Or. LUBA 515 (1994); App. 13a. The Petitioners appealed LUBA's decision to the Oregon Court of Appeals, which affirmed LUBA's decision. 127 Or. App. 647, 874 P.2d 99 (1994); App. 1a. The Petitioners then filed a Petition for Review with the Oregon Supreme Court, which denied the Petition. 320 Or. 110, 881 P.2d 141 (1994); App. 54a.

II.

ARGUMENT

REASONS FOR DENYING THE WRIT

This case does not present the First Amendment issues that Petitioners ask the Supreme Court to decide. The condition imposed by the City on Petitioners' land use permit does not require the petitioners or their successors in interest to surrender any right to speak in opposition to formation of a local improvement district. The City's Improvement Procedures Ordinance (LOC Chapter 40) requires the City Council to hold a public hearing prior to formation of a local improvement district at which any person, including Petitioners, can testify in opposition, in favor, or in any other manner they desire. As the Oregon Court of Appeals succinctly held:

> [T]he remonstrance procedure, and the so-called non-remonstrance condition, affect only petitioner's right to be counted in an extraordinary majority that can abate the decision for six months; they do not limit petitioners' right to speak on the proposed district or any related matters orally or in writing. 127 Or. App. at 651; App. 8a.

As the Court of Appeals decision makes clear, this is a statutory interpretation case, not a First Amendment case.

For this reason, the case also does not implicate the doctrine of "unconstitutional conditions," which is only applicable if a condition affects a constitutional right. The Petitioners do not and have not alleged that the condition violates the Fifth Amendment to the United States Constitution. This Court's holding in *Dolan v. City of Tigard*, 114 S. Ct. 2308 (1994) (*"Dolan"*) is thus not applicable.

In conclusion, this case does not present an important question of federal law worthy of the Supreme Court's review under Rule 10(1) of this Court.

A. The Permit Condition Imposed By The City Does Not Affect Speech.

Petitioners' argument in its first reason for granting the writ is based upon a fundamental misstatement of the case. As Petitioners correctly note in their Statement of the Case (Petition, Page 5-6), the issue before this Court and the lower tribunals is whether the City appropriately imposed a condition on approval of a land use permit that requires the Petitioners to execute an agreement waiving their right to remonstrate against formation of a local improvement district. Petitioners' argument is based not on the City's decision to impose the condition, but on selected excerpts from the non-remonstrance agreement that Petitioners subsequently executed as a result of the condition. As LUBA notes, the validity of the agreement itself is not presented in this case. 26 Or. LUBA at 518; App. 15a-16a.

Perhaps as a result of this fundamental error, petitioners base their entire argument that the City infringes on their freedom of speech upon the definition of "remonstrate" in *Webster's Seventh New Collegiate Dictionary* 725 (1971). Petition, pages 8-9. This argument ignores the Council's express interpretation of the term and the context of the term in both the agreement and in the City Code.

Lake Oswego City Charter Chapter IX, Section 37 authorizes the City to provide by ordinance for construction of local improvements by special assessment of benefitted properties via formation of a local improvement district (LID). Respondent's Appendix (R.App.) 1a. Pursuant to this authority, Lake Oswego Code (LOC) 40.010 to 40.160 (the Improvement Procedures Ordinance) sets forth the process for initiation and creation of an LID.[1] R.App. 2a-20a.

The Ordinance requires the City Council to hold two public hearings, the first prior to formation of the LID and the second upon completion of the project prior to

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[1] In the State of Oregon, the requirements and procedures for constructing a local improvement by assessment of benefitted properties via formation of a local improvement district is entirely a creature of local charter and ordinance. Although Oregon Revised Statutes (ORS) 223.387 to 223.401 provide general authority to construct local improvements by special assessment, ORS 223.389 expressly empowers a local government to enact its own procedures for formation and assessment of an LID. R.App. 20a-26a, 22a. ORS 223.389(2) does not require cities to accord remonstrances of property owners any special weight. R.App. 22a. A city may provide for remonstrance against all, some or no types of local improvement districts. *City of Woodburn v. Dekabi*, 20 Or. App. 426, 531 P.2d 913 (1975).

imposition of the assessment. LOC 40.060; 40.090; R.App. 8a-9a; 12a-13a. Prior to the first hearing, a property owner in the proposed district may file a written remonstrance to formation of the LID. LOC 40.050(1); R.App. 7a. If two-thirds of the owners file such written remonstrances, formation of the LID is suspended for six months. *Id.* LOC 40.050(2) expressly provides, however, that oral objections will also be considered at the public hearing. R.App. 8a. In addition, LOC 40.060(2) expressly requires the City Council to consider *any* testimony in addition to the written remonstrances prior to making the decision to form the LID. R.App. 8a. Notice of these respective rights are published twice in the newspaper and mailed to all property owners in the proposed district prior to the hearing on formation.[2] LOC 40.040(1)(e),(f); (2)(a),(e). R.App. 5a-7a.

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[2] Petitioners argue in subsections B and C of their first argument that the non-remonstrance condition is vague and overbroad, and thus could chill protected speech, because a subsequent property owner could read the non-remonstrance agreement out of context and presume that he or she could not testify at all. Petition, pages 12 to 16. As noted above, the notice provisions of LOC 40.040 require written notice to be sent ten days prior to the hearing to all property owners in the proposed LID. LOC 40.040(2). R.App. 7a. The required notice specifically differentiates between written remonstrances and oral testimony. LOC 40.040(2)(a),(e); 40.040(1)(e),(f). R.App. 5a-7a. All persons subject to a non-remonstrance agreement are thus fully informed of the distinction, and of their rights to testify, prior to the hearing on formation of the LID.

Indeed, Petitioners' vagueness and overbreadth arguments are contradictory. Petitioners' overbreadth argument presumes that a property owner subject to a non-remonstrance agreement will be ignorant of his or her rights under the City's Improvement Procedures Ordinance and will not expend any effort to

Condition 3 of the original minor partition required the Petitioners to execute a non-remonstrance agreement waiving their right to file a written remonstrance to formation of an LID for road improvements. App. 43a-44a. The condition was imposed to comply with an approval criterion that requires a minor development to provide public services, including roads, up to city standards. App. 44a-45a. City staff testified that the abutting roads were not up to City Standards in terms of width, curbs, gutters, storm drainage, sidewalks or pathways. App. 45a. The Council concluded that the condition would allow improvement of the substandard city streets when the increased traffic resulting from the additional density, in conjunction with traffic produced as a result of other incremental development, creates the need to improve the road. App. 46a-47a. The Council concluded that this condition is reasonably related to mitigating the traffic impacts resulting from the partition and was more practical and less burdensome on the property owner than requiring immediate construction of a half-street improvement or denying all development that would increase density or intensity of use until the street is improved.[3] *Id.*

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discover those rights. Petition, pages 14 -15. Petitioners' vagueness argument, on the other hand, presumes that a property owner has knowledge of the enforcement provisions of the City's development ordinance and would be "chilled" by such knowledge from testifying. Petition, pages 12 and 13. Because of the notice requirements of LOC 40.040, the exact opposite will be true.

[3] Petitioners have not and do not contest the City's rationale or evidentiary support for imposition of the condition pursuant the applicable City Code Provisions.

In response to the Petitioners' argument that the partition permit should be modified to delete condition 3, the City Council construed the ordinance scheme as follows:

> *Applicants' primary argument is that the agreement deprives them, or chills their exercise of, free speech and the right to petition government for redress of grievances under Oregon Constitution Article I, Section 8 and Article I, Section 26, and under the First and Fourteenth Amendments of the U.S. Constitution, because it prevents them from objecting to the formation of an LID.*
>
> *The Council disagrees. Lake Oswego Charter Article IX, Section 37 and LOC Chapter 40 govern formation of LIDs. LOC 40.060 and 40.090 require two public hearings to be held: The first hearing is to determine whether the proposed LID should be formed, draw the appropriate boundaries of the LID, determine the appropriate assessment formula and set the appropriate interest rate. The second hearing is to hear objections to the amount of the assessment. LOC 40.050(1) authorizes affected property owners to file written remonstrances objecting to formation of the LID at the time of the first hearing. If written remonstrances are received from at least two-thirds of the property owners, formation of the LID is suspended for six months. A non-remonstrance agreement waives the property owner's right to file a written remonstrance and thereby potentially delay the project for six months.*
>
> *LOC 40.050(2), however, expressly authorizes and requires the Council to consider oral objections to the project at the first hearing. LOC 40.040 expressly requires the published notice to state that*

> *oral objections will be considered at the public hearing. LOC 40.060(2) expressly requires the Council to consider any testimony in addition to written remonstrances in deciding whether to proceed with formation of the LID. LOC 40.080(2) and 40.090 notifies and allows "all persons" to testify in objection to the proposed assessments at the second hearing. Regardless of whether a person has waived his or her right to delay the project in a non-remonstrance agreement, such persons are notified of their right to appear, and may appear, before the Council at the first and second public hearings and object to or otherwise testify regarding the LID on the merits. Based upon this express language, the Council concludes that the non-remonstrance agreement condition does not limit the applicants' right to speak on any issue or to seek redress of grievances from the Council in violation of the constitutional provisions cited above.* App. 47a-48a.

Both LUBA and the Court of Appeals cited the Council's above noted finding with approval. *Larsson*, 26 Or. LUBA at 520, App. 18a-19a; 127 Or. App. at 650, App. 6a-7a. Indeed, both LUBA and the Court of Appeals concluded that they would have independently arrived at the same conclusion based upon the clear language of the City Code. 26 Or. LUBA at 522-523, App. 21a-22a; 127 Or. App. at 651, App. 7a-8a.

For these reasons, the City submits that this is really a simple statutory construction case. Petitioners' claim that the contested condition restricts "the only legal way a citizen can effectively oppose formation of an LID" is

facially refuted by LOC 40.050(2), 40.060(2) and 40.090.[4] Unless this Court concludes that these provisions do not mean what they say, this case is not a First Amendment case.

Petitioners also argue that the non-remonstrance condition affects their voting rights under the Voting Rights Act, 42 U.S.C.A Section 1973i(a) (1994) and the general civil rights statute, 42 U.S.C.A. Section 1983 (1994). Once again, Petitioners bootstrap an argument from general definitions and ignore the applicable language of the City Code. The cited definitions broadly describe "vote" as an official expression of choice by an "elector" or "voter" on a "proposed measure." LOC 40.050(1) does not call for an election by the voters on formation of an LID. Rather, it grants affected property owners a special right not enjoyed by city electors generally to participate in a procedure that can, in certain circumstances, delay formation of an LID for six months. This case is not a voting rights case, either.

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[4] The right to testify on formation of the LID granted by these provisions also refutes Petitioners' argument that the condition inhibits the right to petition government for redress of grievances. Petitioners argue, however, that the right to petition means more than the opportunity to express their opinion, it also must include the right to be heard in a "meaningful way." Petition, page 17. Petitioners apparently believe the "right to petition" includes the right to compel the government to grant the petition. The republican form of government would quickly become impossible if this were the standard. The constitutional cure for non-responsive government officials is the ballot box.

B. Because The Permit Condition Does Not Affect First Amendment Rights, It Also Does Not Implicate The "Doctrine Of Unconstitutional Conditions."

Petitioners argue that the City's condition requiring them to sign a non-remonstrance agreement impermissibly conditions receipt of a government benefit on the waiver of constitutionally guaranteed free speech rights in violation of the "doctrine of unconstitutional conditions." Petitioners note that this Court cited the doctrine in support of its decision in *Dolan v. City of Tigard*, 114 S. Ct. at 2316 - 2317, and argue that such reference requires "at a minimum" that the Petition be granted and the case sent back to the Oregon Supreme Court to address the doctrine.

By definition, however, the doctrine is only implicated if the condition attached infringes on a constitutionally protected interest. *Dolan, supra; Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). As noted above, the City Council, LUBA and the Oregon Court of Appeals concluded at the threshold that the non-remonstrance agreement condition does not infringe on Petitioners' rights of speech or expression under the First Amendment, based upon the clear language of the City's Improvement Procedures ordinance. Unless this Court reverses the interpretation of this ordinance by the three Oregon tribunals, there is no "unconstitutional" condition for the Oregon Supreme Court to address. Petitioners do not raise and have not raised a *Dolan*-style Fifth Amendment claim, or any other constitutional defect aside from their First Amendment arguments.

In addition, this Court noted in *Dolan* that the doctrine of unconstitutional conditions only prohibits such a condition if it has "little or no relationship" to the discretionary benefit conferred by the government. 114 S. Ct. at 2316 - 2317. In this case, the City Council expressly concluded, based upon the evidence in the record, that the condition was reasonably related to mitigating the impact of the increased traffic that would result from the partition, in conjunction with other incremental development on the street. App. 46a-47a. The Council also concluded that the waiver, which requires no up-front expense and may not be triggered for years, was more practical and less burdensome on the property owner than the City's other available options for ensuring adequate streets. *Id.* The Council thus made "an individualized determination" that the condition "is related both in nature and extent to the impact of the proposed development," the test articulated by this Court in *Dolan*. 114 S. Ct. at 2319 to 2320. The Petitioners did not challenge these findings and conclusion.

For these reasons, this case is also not an unconstitutional conditions case.

C. This Case Does Not Warrant Review By The United States Supreme Court.

Rules of the Supreme Court Rule 10.1 sets forth this Court's guidelines for deciding whether to grant a Petition for Certiorari. Rule 10.1(b) and 10.1(c) regard petitions for review of state court decisions.

Rule 10.1(b) favors review of cases where a state court decides a federal question in conflict with another

state court of last resort or a decision of a United States Court of Appeals. Petitioners have identified no conflicting cases on point. Indeed, the Washington State Supreme Court and Court of Appeals have both concluded that similar non-remonstrance agreements to annexation do not violate the First Amendment. *Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima*, 122 Wash. 2d 371, 858 P.2d 245 (1993); *Five Mile Prairie v. City of Spokane*, 51 Wash. App. 816, 755 P.2d 836 (1988). The only reported federal case on point also concludes that similar non-remonstrance agreements to annexation do not violate the First Amendment. *Blackwell v. City of St. Charles*, 726 F. Supp. 256 (E.D. Mo. 1989), *aff'd based on the district court's reasoning*, 917 F.2d 1150 (8th Cir. 1990). Review of this case is not warranted under Rule 10.1(b).

Rule 10.1(c) favors review when a state court has decided an important question of federal law which has not been, but should be settled by the U.S. Supreme Court, or which conflicts with a decision of the Supreme Court. As noted above, this case is really a statutory interpretation case, not a First Amendment case. Petitioners only get to the First Amendment by ignoring their rights to testify on formation of an LID granted by the City Code. The Petitioners' interpretation was unanimously rejected by the City Council, LUBA and the Oregon Court of Appeals. The Oregon Supreme Court did not find a significant enough *state* question to take the case. This is not a case worthy of the attention of the United States Supreme Court.

III.

CONCLUSION

For these reasons, Respondent City of Lake Oswego, Oregon, respectfully requests the Court to deny the Petition for Writ of Certiorari to the Oregon Supreme Court.

Dated: January 4, 1995.

Respectfully submitted,

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APPENDIX TO

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Lake Oswego Charter
Chapter IX. Public Improvement,
Section 37, Improvements

Section 37. Improvements.

The procedure for making, altering, vacating, or abandoning a public improvement or other service is governed by general ordinance or, to the extent not so governed by the applicable general laws of the state. The formation of an assessment district, or local improvement district or similar area to be assessed for the financing of any public improvements proposed to be financed wholly or in part by assessment specifically against benefited properties shall be suspended for six months upon a remonstrance thereto by the owners of two-thirds of the property proposed to be assessed therefor. The Council may proceed notwithstanding such two-thirds remonstrance: (a) if the improvements is a sidewalk, or (b) if the Council by unanimous vote of the members present and eligible to vote declares that the improvement is needed at once because of emergency. For the purpose of this Section "owner" means the record holder of legal title; except that, if there is a purchaser of land according to a record land sale contract, or according to a verified writing by the record holder of legal title to the land filed with the City Recorder, the purchaser is the "owner." For the purpose of this Section, an emergency is an immediate hazard to the health, safety, or welfare of the people of Lake Oswego, proved by reliable, substantial and probative evidence on the record before the City Council.

Lake Oswego Code
Chapter 40, Improvement Procedure
Sections 40.010 to 40.160

40.010. Definitions.

Unless the context requires otherwise:

(1) "Director" means the Director of the City of Lake Oswego Public Works Department.

(2) "Local improvement" means:

(a) The grading, graveling, paving or other surfacing of any street, or opening, laying out, widening, extending, altering, changing the grade of or constructing any street.

(b) The construction or reconstruction of sidewalks.

(c) The installation of ornamental street lights.

(d) The installation of underground wiring or related equipment.

(e) The reconstruction or repair of any street improvement mentioned in this subsection.

(f) The construction, reconstruction or repair of any sanitary or storm sewer, or water main.

(g) The acquisition, establishment, construction or reconstruction of any off-street motor vehicle parking facility.

(h) The construction, reconstruction or repair of any flood control dike or dam.

(i) The construction, reconstruction, installation and equipping of a park, playground or City recreation facility.

(j) Any other local improvement for which an assessment may be made on the property specially benefited.

(3) "Lot" means lot, block, or parcel of land.

(4) "Owner" means the owner of the title to real property or the contract purchaser of real property, of record as shown on the last available complete assessment roll in the office of the county assessor.

(5) "Recorder" means the City Recorder for the City of Lake Oswego. (Ord. No. 365, Sec. 1; 6-22-48. Ord. No. 737, Sec. 1; 11-15-60. Ord. No. 1247, Sec. 1; 8-6-68. Ord. No. 1276, Sec. 1; 12-3-68. Ord. No. 1603, Sec. 1; 1-20-76. Ord. No. 1802, Sec. 1; 6-9-81.)

40.020. Initiation of Proceedings.

(1) Whenever the City Council deems it expedient to perform any local improvement for which it is anticipated that special assessments will be levied, it shall, by resolution, declare its intention to initiate such improvement and direct that an engineering study of such project be made and that a written project report containing the information specified in LOC 40.030 be filed with the Recorder.

(2) Whenever the City of Lake Oswego has expended funds for the construction of any local improvement and subsequently the City Council deems it expedient to initiate a local improvement district in order

to levy special assessments against the property benefited by such local improvement, it shall, by resolution, declare its intention to initiate such improvement district and direct that the final plans of this public improvement as constructed, together with a written project report containing the information specified in LOC 40.030 be filed with the Recorder.

(3) Whenever the owners of 51 percent of the abutting property owners propose a local improvement over an area at least 100 yards in length or serving an area of at least 100 square yards and desire to form themselves into an improvement district for the purpose of accomplishing such improvement they may, by written petition filed with the Director, request the Council to declare by resolution the intent of the Council to initiate such improvement and to direct the preparation of the study as specified in subsection (1) of this section. The Council, if satisfied that the petition is signed by owners of at least 51 percent of the property owned within the proposed district specified in the petition, shall pass the requested resolution unless, by a vote of at least two-thirds of the Councilors present, the Council deems it not in the public interest to comply with the petition. (Ord. No. 365, Sec. 1; 6-22-48. Ord. No. 1247, Sec. 2; 8-6-68. Ord. No. 1802, Sec. 2; 6-9-81.)

40.030. Written Report; Content.

The written project report specified in LOC 40.020 shall contain the following information:

(1) A full description of the project and its boundaries. Project plans and specifications shall be prepared but need not be filed with the report;

(2) An estimate of the probable cost of such project (or a statement of the actual cost if the project has been completed) including legal, administrative, construction interest, and engineering costs attributable thereto.

(3) A map of the proposed local improvement district.

(4) A recommended method of assessment.

(5) A description of each lot, or portion thereof, specially benefited by the project with the name and address of the owner thereof, as shown by the last assessment roll of the county.

(6) The assessed valuation and estimated amount of assessment of each lot or portion thereof specially benefited, together with any unpaid assessments against each lot.

(7) The construction financing interest rate then currently in effect and the number of the resolution establishing that rate. (Ord. No. 365, Sec. 2; 6-22-48. Ord. No. 381, Sec. 1; 4-26-49. Ord. No. 1276, Sec. 2; 12-3-68. Ord. No. 1603, Sec. 2; 1-20-76. Ord. No. 1802, Sec. 3; 6-9-81.)

40.040. Notice of Hearing.

Promptly after the filing of the written project report as required by LOC 40.020, the Recorder shall:

(1) Cause a notice to be published for a period of two successive publications in a newspaper of general

circulation in the City. The notice shall state the following:

(a) That the written project report is on file and may be examined at the Recorder's office,

(b) The date the written project report was filed,

(c) The estimated probable cost of the proposed improvement or the actual cost of the improvement if it has been completed,

(d) A description of the proposed improvement district and that a preliminary map of the proposed district may be examined at City Hall.

(e) The time and place of the hearing required by LOC 40.060 including a statement that oral objections will be considered at such hearing, but shall not be counted as part of the written remonstrance requirement necessary to suspend the project for six months pursuant to LOC 40.050.

(f) That all persons wishing to formally remonstrate against the formation of the district must present their remonstrance in writing in the time and manner set forth in LOC 40.050 for them to be considered remonstrances for the purpose of LOC 40.050.

(2) Not less than 10 days prior to the hearing required by LOC 40.060, mail to each property owner designated in the written engineering report a notice stating:

(a) The information set forth in subsection (1) of this section.

(b) The recommended method of assessment.

(c) The estimated amount of assessment for each lot or portion thereof owned by the owner and whether the assessments are being levied prior to construction based upon estimates of project cost or after construction based upon known costs.

(d) The construction financing interest rate currently in effect and the number of the resolution establishing that rate.

(e) The specific procedure for filing remonstrances provided by LOC 40.050.

(3) Post a copy of the preliminary map of the proposed improvement district at City Hall. (Ord. No. 365, Sec. 3, 6-22-48. Ord. No. 1802, Sec. 4; 6-9-81. Ord. No. 1836, Sec. 1; 7-29-82.)

40.050. Filing of Remonstrance to Formation of Improvement District; Defeat of Proposal by Remonstrance.

(1) Objections by property owners within the proposed district to the formation of the proposed improvement district must be in writing, and filed with the Recorder not later than the close of business the day of the hearing set forth in LOC 40.060. Except as provided by Section 37 of the Lake Oswego Charter, any proposal to levy and collect any special assessment under this chapter shall be suspended for six months upon written remonstrance of two-thirds of the owners of property to be assessed.

(2) Oral objections will be considered at the hearing provided in LOC 40.060. However, oral objections shall not be counted for the purpose of suspending the project as provided in subsection (1) of this section. (Ord. No. 365, Sec. 4; 6-22-48. Ord. No. 1247, Sec. 4; 8-6-68. Ord. No. 1276, Sec. 3; 12-3-68. Ord. No. 1417, Sec. 1; 2-2-71. Ord. No. 1802, Sec. 5; 6-9-81.)

40.060. Hearing; Objections; Authorization To Form District and Construct Project.

(1) After the filing of the written engineering report, but not less than fifteen days after the date of the first publication of notice pursuant to LOC 40.040(1), the Council shall hold a hearing to consider any objections to the proposed improvement district and authorize the formation of the district and initiation of the project if it is so desired.

(2) After considering any written remonstrances filed and any testimony relating to the proposed district, the City may, by resolution adopt, amend and adopt, or reject the written project report. The Council may require a supplementary or further report from the Director. If the Council chooses to adopt, or amend and adopt the report, the resolution setting forth that determination shall at a minimum:

(a) Form the local improvement district, assign it a number, and establish its boundaries, subject to later change pursuant to the provisions of this chapter.

(b) Determine the time and manner of construction. The Council may provide that the City will do the work or any portion of the work itself.

(c) Direct that the project be commenced.

(d) Establish a special account for the receipt and disbursal of monies relating to the project.

(e) Establish the method of assessment, subject to change pursuant to the provisions of this chapter.

(f) Place a pending lien upon the benefited property specified in the written project report as adopted. The pending lien shall be recorded in the same manner as the final assessment lien provided in LOC 40.120.

(g) Establish the construction financing interest rate applicable to the district. (Ord. No. 365, Sec. 4; 6-22-48. Ord. No. 1067, Sec. 1; 5-18-65. Ord. No. 1247, Sec. 5; 8-6-68. Ord. No. 1802, Sec. 6; 6-9-81.)

40.065. District Boundary Modification.

(1) At any time the Council may determine that the boundaries of a district which has been formed should be modified to include new property benefited by the improvement or excluded property determined not to be benefited.

(2) The Council shall accomplish boundary modifications by amending the resolution which formed the district.

(3) Prior to adoption of the amending resolution the Council shall hold a hearing on the boundary modification. Notice of the hearing shall be given as provided by LOC 40.040.

(4) The right of property owners to remonstrate against the proposed modification is the same as defined in LOC 40.050 for the formation of a district. (Ord. No. 1802, Sec. 7; 6-9-81.)

40.070. Method of Assessment; Authority of City to Pay All or Part of Costs.

The Council may:

(1) Use any just and reasonable method of determining the extent of any improvement district that is consistent with the benefits derived.

(2) Authorize payment by the City of all or any part of the cost of such improvement; provided, that the method selected creates a reasonable relation between the benefits derived by the property specially benefitted and the benefits derived by the City as a whole.

(3) Use any method of apportioning the sum to be assessed among the properties determined to be specially benefitted that is just and reasonable.

(4) At any time prior to the effective date of the ordinance levying the assessments for any district, modify the method adopted in the resolution forming the district if the Council determines that a different method is a more just and reasonable method of apportioning the cost of the project to the properties benefitted. The time

limitation established by this subsection does not apply to reassessment proceedings pursuant to LOC 40.160 and the method of assessment may be modified as a part of such proceedings. (Ord. No. 365, Sec. 5; 6-22-48. Ord. No. 1247, Sec. 6; 8-6-68. Ord. No. 1603, Sec. 3; 1-20-76. Ord. No. 1802, Sec. 8; 6-9-81. Ord. No. 1829, Sec. 1; 5-18-82.)

40.080. Director's Assessment Report; Proposed Assessment and Notice Thereof.

(1) As soon as the total cost of the project is ascertained, or if the district is to be preassessed, as soon as the estimated cost of the project is ascertained, the Director shall prepare an assessment report on the project, including a recommendation concerning the fair apportionment to the properties specially benefitted within the assessment district of the total actual or estimated cost, including legal, administrative, construction interest, and engineering costs attributable to the project and a recommendation concerning the Bancroft installment financing rate applicable to the project.

(2) A map of the assessment district showing the proposed assessments of each lot or portion of land therein shall be posted in the City Hall and a notice published in a newspaper of general circulation within the City for two successive weeks stating that the proposed assessments are on file at the City Hall and requiring all persons having objections to the proposed assessments to present their objections at a meeting of the Council which shall be held not less than fifteen (15) days after first publication of such notice.

(3) It shall be the duty of the Recorder to send by mail postpaid to each of those designated in the report of the Director a notice which sets forth that the map showing the proposed assessments is on file in the City Hall, the amount of the proposed assessment on a lot or portion of a lot owned by such persons, the recommended Bancroft installment financing rate and requiring objections to the proposed assessments to be presented to the City Council at the time specified in the published notice. The notices which are required to be mailed shall be placed in the mail not less than ten (10) days prior to the date set for the meeting of the Council to hear objections to the proposed assessments. (Ord. No. 365, Sec. 6; 6-22-48. Ord. No. 1247, Sec. 6; 8-6-68. Ord. No. 1603, Sec. 4; 1-20-76. Ord. No. 1802, Sec. 9; 6-9-81. Ord. No. 1836, Sec. 2; 7-29-82.)

40.090. Hearing on Proposed Assessments; Levy of Assessments.

(1) When the Council after hearing the objections to the proposed assessments has ascertained what it deems to be a fair, just and proper assessment of benefits to the property it determines to be specially benefited, it may pass an ordinance specifying in detail such assessments and setting the Bancroft installment financing rate applicable to the district.

(2) If the Council at such hearing deems it just and proper to increase the amount of any proposed assessment it shall fix a time for a further hearing on such increase. The Recorder shall send notice by mail to each owner shown on the Director's final report, stating the

purpose of the further hearing and giving the date of the hearing.

(3) After such further hearing, the Council may pass an ordinance assessing such increase, and if at the time of such further hearing, the ordinance specifying in detail the final assessments has not yet been passed, the Council at that time shall pass such an ordinance levying the final assessments and setting the financing interest rate.

(4) Promptly after passage of the ordinance levying the final assessments, the City Recorder shall cause to be published in a newspaper of general circulation within the City, a notice that such ordinance has been passed, and that application for bonding the assessments will be received for thirty (30) days after the effective date of the ordinance. (Ord. No. 365, Sec. 7; 6-22-48. Ord. No. 1802, Sec. 10; 6-9-81.)

40.100. Alternative Methods of Financing.

When, in the opinion of the Council, on account of topographical or physical layout, unusual or excessive public travel, or other character of work involved, or when the Council otherwise believes the situation warrants it, it may contribute what it deems a fair proportion of the cost of such improvement from general funds of the city, and the amount to be assessed to the property benefitted shall be proportionately reduced. Nothing contained in this chapter shall preclude the Council from using other available means of financing improvements, including federal or state grants-in-aid, sewer service or other types of service charges, revenue bonds, general obligation bonds, or other legal means of finance. In the

event any of such other means of financing are used, the Council may, in its discretion, levy special assessments pursuant to this chapter to cover any part of the costs of the improvement not covered by such means. (Ord. No. 365, Sec. 8; 6-22-48.)

40.110. Appeals.

Owners of any property against which an assessment or reassessment for local improvements has been imposed may seek a review thereof under the provisions of ORS 34.010 to 34.100. (Ord. No. 365, Sec. 9; 6-22-48. Ord. No. 1603, Sec. 5; 1-20-76.)

40.120. Recordation of Liens and Collection of Assessments.

The Council, at the time of passing the ordinance levying the final assessment or at any time thereafter, shall by resolution or ordinance direct the City Recorder to enter in the docket of city liens the respective amounts assessed upon each particular tract or parcel of land with the names of the record owners thereof. Upon such entry in the lien docket, the amounts so entered shall be immediately due and payable and shall be a lien and charge upon the respective lots, tracts, and parcels of land against which the same are placed. Such liens shall be first and prior to all other liens except as otherwise provided by law. The Bancroft installment financing interest rate applicable to the district shall be charged on all amounts not paid within 30 days from the date of such entry. After 30 days from the date of entry in the lien docket, the city may proceed to foreclose as delinquent

any lien which is unpaid or for which arrangements for payment have not been made. The delinquent assessment payment interest rate shall be charged to such sums due. Foreclosure may be in any manner authorized by state statutes for the foreclosure of assessment liens. (Ord. No. 365, Sec. 10; 6-22-48. Ord. No. 1360, Sec. 1; 1-6-70. Ord. No. 1603, Sec. 6; 1-20-76. Ord. No. 1802, Sec. 11; 6-9-81.)

40.130. Authority to Abandon Proceedings.

The City Council shall have full power and authority to abandon and rescind proceedings for projects pursuant to this chapter at any time prior to the final consummation of such proceedings. (Ord. No. 365, Sec. 11; 6-22-48.)

40.140. Validity of Assessments.

No assessment made pursuant to this chapter shall be invalid by reason of a failure to give, in any report, in the proposed assessment, in the ordinance making the assessment, in the lien docket or elsewhere in the proceedings, the name of the owner of any lot, tract or parcel of land or the name of any person having a lien upon or interest therein, or by a mistake in the name of any such person, or the entry of a name other than the name of such owner or other person having a lien upon or interest therein, or by a mistake in the name of any such person or the entry of a name other than the name of such owner or other person having a lien upon or interest in such property, or by reason of any error, mistake, delay, omission, irregularity, or other act, jurisdictional or otherwise, in any of the proceedings or steps herein before specified, unless it appears that reasonable notice has not been

given of the hearing upon the proposed assessment or that the assessment as made, insofar as it affects the person complaining, is unfair and unjust, and the Council shall have power and authority to remedy and correct all such matters by suitable action and proceedings. (Ord. No. 365, Sec. 13; 6-22-48.)

40.150. Adoption of "Bancroft Bonding Act".

Except for matters modified in this chapter, the provisions of ORS 223.205 to 223.300 (1979 replacement part), which are known as the "Bancroft Bonding Act", are hereby adopted and made a part hereof by reference. (Ord. No. 365, Sec. 12; 6-22-48. Ord. No. 1802, Sec. 12; 6-9-81.)

40.151. Interest Rates.

(1) Interest on funds expended by the City in connection with the construction or financing of a local improvement shall be charged. There is established for the purpose of computing interest the following distinct interest rate classifications:

(a) Construction financing – Interest charged for construction financing begins the date the first funds are expended in connection with a project and ends on the 60th day after acceptance of the project by City.

(b) Bancroft installment financing – Interest charged to property owners choosing to pay the assessment in installments under the Bancroft Bonding Act procedures whose accounts are kept current.

(c) Delinquent Assessment Payment – Interest charged to property owners choosing to pay the assessment in installments under Bancroft Bonding procedures who fail to pay two consecutive installment payments. This interest rate will be assessed beginning the day after the due date of the second installment payment. The interest due will be computed at this delinquent rate on the entire principal balance and this rate will continue to be charged until all outstanding billings are paid in full. This interest rate is also charged to those property owners not choosing to pay in installments that have not paid pursuant to LOC 40.120. For such accounts the rate begins on the 31st day after entry of the assessment in the lien docket and is computed from the original date of entry in the lien docket. (Ord. No. 1875, Sec. 1; 2-21-84.)

(d) System development charge financing – Interest charged to persons financing a system development charge through the Bancroft Bonding Act procedures pursuant to LOC 39.04.070.

(2) The Council shall, by resolution, establish the interest rate applicable to each classification identified in subsection (1) of this section. Such interest rate shall not exceed the maximum allowed by any applicable law. In the event that the rate established is found to exceed such legal maximum then that maximum shall be used as the applicable rate until the resolution establishing rates is revised. (Ord. No. 1802, Sec. 13; 6-9-81.)

40.155. Segregation of Assessments; Fees.

Whenever an application has been made under the provisions of LOC 40.150 (and the Bancroft Bonding Act

as therein adopted), and the application has been accepted and the payment of the assessment has been in fact financed by such procedure, the lien of such assessment may be segregated upon the following terms and conditions:

1. The property for which the segregation is to be made shall have been assessed as a unit and entered accordingly in the docket of liens.

2. There shall be no delinquent installments of principal or interest on the assessment of the entire parcel.

3. Written application shall be made to the City in such form as may be required, and such applications shall be accompanied by the fees established as hereafter provided.

4. If the Director of Public Works determines that the lien may be segregated and divided without prejudice to the overall security of the entire balance owed, he shall establish an equitable division of the assessment based upon the original assessment formula and the preservation of the security interest. Such segregation shall describe the various parcels of the entire tract and the amount of the assessment to be apportioned to each parcel. He may require that the portion of the assessment segregated and apportioned to a particular parcel be paid in full before the remaining parcels shall be relieved of liability for payment of that portion of the lien.

5. If application is approved and the fees paid, the Director of Public Works shall certify the facts to the City

Recorder. Thereupon, upon compliance with any conditions of payment, the City Recorder shall cause appropriate entries to be made in the docket of liens segregating the total assessment. When such entries are made, the lien shall thereby be segregated and divided, and shall constitute a lien only in the amounts and as to the parcels thereby provided.

In order to help defray the costs of investigation, preparing legal descriptions, calculating an equitable division of the assessment and making lien docket entries, the City Council may by resolution establish and from time to time amend a schedule of fees to be paid with any application filed under this section. Such fees shall not be refundable if the application is disapproved or the applicant withdraws his application. (Ord. No. 1526, Sec. 1; 12-4-73.)

40.160. Reassessment.

Whenever all or part of an assessment or reassessment for any local improvement is declared void or set aside for any reason, or its enforcement refused by any court, whether directly or by any decision of such court; whenever the Council shall be in doubt as to the validity of such assessment or reassessment, or if a district was preassessed and the Council determines the assessments should be adjusted, the Council may make a new assessment. The reassessment procedures for making the new assessment shall insofar as possible follow the same procedures as provided for making an initial assessment as set forth in LOC 40.070 to 40.150. The new assessment

shall not be limited to the amounts included in the original assessments, nor shall it be limited to the property embraced in the original assessment if the Council finds that additional property is specially benefitted and subject to assessment. Credit shall be allowed on the new assessment for any payments made on the original assessment, such payments to be credited as of the date of payment. Interest on the original assessments may be included in the new assessment to the extent that the new assessment includes amounts also included in the original assessment; or if the Council deems it more equitable to do so, it may include as part of the overall assessable project costs interest, not exceeding the construction financing interest rate in effect and applicable to the district at the time of the original proceedings in connection with the district, on monies paid by the City in connection with the construction or financing of the project. (Ord. No. 365, Sec. 14; 6-22-48. Ord. No. 1603, Sec. 7; 1-20-76. Ord. No. 1802, Sec. 14; 6-9-81. Ord. No. 1836, Sec. 3; 7-29-82.)

OREGON REVISED STATUTES (ORS) 223.387 TO 223.401

ASSESSMENTS FOR LOCAL IMPROVEMENTS

223.387 Description of real property; effect of error in name of owner. In levying, collecting and enforcing assessments for local improvement, the following shall apply:

(1) Real property may be described by giving the subdivision according to the United States survey when coincident with the boundaries thereof, or by lots, blocks

and addition names, or by giving the boundaries thereof by metes and bounds, or by reference to the book and page of any public record of the county where the description may be found, or by designation of tax lot number referring to a record kept by the assessor of descriptions of real properties of the county, which record shall constitute a public record, or in any other manner as to cause the description to be capable of being made certain. Initial letters, abbreviations, figures, fractions and exponents, to designate the township, range, section, or part of a section, or the number of any lot or block or part thereof, or any distance, course, bearing or direction, may be employed in any description of real property.

(2) If the owner of any land is unknown, the land may be assessed to "unknown owner," or "unknown owners." If the property is correctly described, no final assessment shall be invalidated by a mistake in the name of the owner of the real property assessed or by the omission of the name of the owner or the entry of a name other than that of the true owner. Where the name of the true owner, or the owner of record, of any parcel of real property is given, the final assessment shall not be held invalid on account of any error or irregularity in the description if the description would be sufficient in a deed of conveyance from the owner, or is such that, in a suit to enforce a contract to convey, employing such description a court of equity would hold it to be good and sufficient.

(3) Any description of real property which conforms substantially to the requirements of this section shall be a sufficient description in all proceedings of assessment relating or leading to a final assessment for a

local improvement, foreclosure and sale of delinquent assessments, and in any other proceeding related to or connected with levying, collecting and enforcing final assessments for special benefits to the property. [1959 c. 219 § 1; 1965 c.282 § 4; 1971 c.198 § 1; 1991 c.902 § 36]

223.389 Procedure in making local assessments for local improvements. (1) The governing body of a governmental unit may prescribe by ordinance or resolution the procedure to be followed in making estimated assessments and final assessments for benefits from a local improvement upon the lots which have been benefited by all or part of the local improvement, to the extent that the charter of the governmental unit does not prescribe the method of procedure. In addition, in any case where the charter of a governmental unit specifies a method of procedure that does not comply or is not consistent with the requirements of the Oregon Constitution, the governing body of the governmental unit may prescribe by ordinance or resolution the procedure which shall comply and be consistent with the requirements of the Oregon Constitution, and the provisions of the ordinance or resolution shall apply in lieu of the charter provisions.

(2)(a) The ordinance or resolution prescribing the procedure shall provide for adoption or enactment of an ordinance or resolution designating the local improvement as to which an assessment is contemplated, describing the boundaries of the district to be assessed. Provision shall be made for at least 10 days' notice to owners of property within the proposed district in which the local improvement is contemplated. The notice may be made by posting, by newspaper publication or by mail, or by any combination of such methods. The notice

shall specify the time and place where the governing body will hear and consider objections or remonstrances to the proposed local improvement by any parties aggrieved thereby.

(b) If the governing body determines that the local improvement shall be made, when the estimated cost thereof is ascertained on the basis of the contract award or the departmental cost of the governmental unit, the governing body shall determine whether the property benefited shall bear all or a portion of the cost. The recorder or other person designated by the governing body shall prepare the estimated assessment to the respective lots within the assessment district and file it in the appropriate office of the governmental unit. Notice of the estimated assessment shall be mailed or personally delivered to the owner of each lot proposed to be assessed. The notice shall state the amounts of the estimated assessment proposed on that property and shall fix a date by which time objections shall be filed with the recorder. Any objection shall state the grounds for the objection. The governing body shall consider the objections and grounds and may adopt, correct, modify or revise the estimated assessments.

(c) The governing body shall determine the amount of estimated assessment to be charged against each lot within the district, according to the special and peculiar benefits accruing to the lot from the local improvement, and shall by ordinance or resolution spread the estimated assessments. [1959 c.219 § 2; 1991 c.902 § 37]

223.391 Notice of proposed assessment to owner of affected lot. If a notice is required to be sent to the owner

of a lot affected by a proposed assessment, the notice shall be addressed to the owner or the owner's agent. If the address of the owner or of the owner's agent is unknown to the recorder, the recorder shall mail the notice addressed to the owner or the owner's agent at the address where the property is located. Any mistake, error, omission or failure with respect to the mailing shall not be jurisdictional or invalidate the assessment proceedings, but there shall be no foreclosure or legal action to collect until notice has been given by personal service upon the property owner, or, if personal service cannot be had, then by publication once a week for two successive weeks in a newspaper designated by the governing body and having general circulation in the governmental unit where the property is located. [1959 c.219 § 3; 1991 c.902 § 38]

223.393 Assessments become liens. Estimated and final assessments shall become a lien upon the property assessed from and after the passage of the ordinance or resolution spreading the same and entry in appropriate lien record of the governmental unit. The estimated assessment lien shall continue until the time the estimated assessment becomes a final assessment. The governmental unit may enforce collection of such assessments as provided by ORS 223.505 to 223.650. [1959 c.219 § 4; 1991 c. 902 § 39]

223.395 Deficit assessments or refunds when initial assessment based on estimated cost. If the initial assessment has been made on the basis of estimated cost, and upon the completion of the work the cost is found to be greater than the estimated cost, the governing body may

make a deficit assessment for the additional cost. Proposed assessments upon the respective lots within the assessment district for the proportionate share of the deficit shall be made; and notices shall be sent; opportunity for objections shall be given; such objections shall be considered; and determination of the assessment against each particular lot, block or parcel of land shall be made as in the case of the initial assessment; and the deficit assessment spread by ordinance. If assessments have been made on the basis of estimated cost, and upon completion the cost is found to be less than the estimated cost, provision shall be made for refund of the excess or overplus. [1959 c.219 § 5; 1991 c.902 § 40]

223.397 [1959 c.219 §§ 6, 7; repealed by 1963 c.507 § 1]

223.399 Powers of governmental unit concerning assessments for local improvements. The governing body of a governmental unit may impose additional procedural requirements. The procedural provisions of ORS 223.387 to 223.399 shall apply only where the charter or an ordinance of a governmental unit does not specify otherwise and the charter or ordinance provisions comply and are consistent with the requirements of the Oregon Constitution. The charter or ordinance provisions shall apply to local improvements permitted by law. No governmental unit shall authorize a local improvement prohibited by percentage of remonstrance or otherwise under the charter of the governmental unit. [1959 c.219 § 8; 1965 c.133 § 1; 1991 c.902 § 41]

223.401 Review of assessment. Notwithstanding any of the provisions of ORS 223.387 to 223.399, owners of any property against which an assessment for local

improvements has been imposed may seek a review thereof under the provisions of ORS 34.010 to 34.100. [1965 c.133 § 2].